Supreme Court, U.S.
FILED

961915 MAY 28 1997

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

MICHAEL P. KELLY, JOHN T. KELLY,
Cross-Petitioners,

v.

DIONNE STAPLES,
and the Secretary, United States Department of Housing & Urban Development,
Respondent.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

JOHN K. LIMOLI
COUNSEL OF RECORD

1402 SUNSET DRIVE
FAIRBORN, OHIO 45324
(937) 878-6051

ATTORNEY FOR CROSS-PETITIONERS
MICHAEL P. KELLY, JOHN T. KELLY

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

28 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a government agency retains jurisdiction when it has completely neglected a case by its failure to timely comply with the Fair Housing Act as amended in 1988, 42 U.S.C. 3602 et. seq. concerning notice of complaint, investigation, conciliation and issuance of probable cause as required by law and violates the due process rights guaranteed to citizens by failure to provide notice in compliance with law and thereby renders its orders invalid.

2. Whether a citizen who compels a government agency to comply with the law, comply with agency regulations, secures due process rights envisioned by Congress and exposes fraudulent conduct of a government agency is a prevailing party.

PARTIES TO THE PROCEEDING

Cross-Petitioners Michael P. Kelly and John T. Kelly are individuals.

Cross-Respondent Dionne Staples is an individual.

Respondent Secretary of Housing and Urban Development is an agency of the United States government.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 21

APPENDIX

See Case No. 96-1712, Dionne Staples v. Michael P. Kelly, John T. Kelly, et al. for Appendices references

TABLE OF AUTHORITIES

Cases — Page

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410, 414 (1945) 19

Bridges v. Wixon,
326 U.S. 135, 152-153 19

Kelly v. Secretary, HUD,
3 F.3d 951 (6th Cir. 1993) (Kelly 1) . . . 12,15,17

Kelly v. Secretary of Housing and Urban Development, and Dionne Staples,
97 F.3d 118 (6th Circ. 1996) (Kelly II) 11

Mohasco Corp. v. Silver,
447 U.S. 807, 818 (1980) 20

Secretary, HUD, on behalf of Herron v. Blackwell,
908 F.2d 864, 869 (11th Cir. 1990) 13

United States v. Caceres,
440 U.S. 471, 753 and 754 (1979) 20

Statutes

28 U.S.C. Section 1254 (1) 2

42 U.S.C. Sections 3601-19 3,12

42 U.S.C. Section 3608(a) 13

42 U.S.C. Section 3608(c) 13

42 U.S.C. Section 3608(d) 13

42 U.S.C. Section 3610(a)(1)(A)(i) 18

42 U.S.C. Section 3610(a)(B)(ii) 13,14

42 U.S.C. Section 3610(a)(B)(iv) 14

42 U.S.C. Section 3610(a)(C) 14

42 U.S.C. Section 3610(g) 15

42 U.S.C. Section 3612(p) 20,21

24 CFR Sections 103.1 through 104.590 3

24 CFR Section 103.50 13

24 CFR Section 103.225 14

24 CFR Section 103.300(c) 16

24 CFR Section 103.330(a) 16

24 CFR Section 103.400 15

Court Rules

Rule 12.5 of the Rules of the Supreme
Court of the United States 2

Other References

Congressional Record, Vol. 134, Part 14,
Page 19716 19

Congressional Record, Vol. 134, Part 15,
Page 20918 19

House Report on Fair Housing Amendments
Act of 1988, p. 33 18,19

Michael P. Kelly and John T. Kelly (Kellys) respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in Kelly v. Secretary of Housing and Urban Development, and Dionne Staples, 97 F.3d 118 (6th Cir. 1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 97 F.3d 188 and is reprinted in the appendix to Petitioner's petition for writ of certiorari, Case No. 96-1712 [hereinafter "Petitioner. App."] at pp. A-1 to A-16. The Initial Decision on Remand of the Administrative Law Judge of the Department of Housing and Urban Development is reprinted in Case No. 96-1712 at Petitioner. App. D87 to D108. A prior decision of the Court of Appeals for the Sixth Circuit, 3 F.3d 951 (6th Cir. 1993) is reproduced at Petitioner. App. B17 to B33. The Initial Decision of the Administrative Law Judge of the Department of Housing and Urban Development is reprinted in Case No. 96-1712 at Petitioner. App. C34 to C86. The Initial Decision and Order on Applications for Attorney's Fees in Case No. 96-1712 at Respondents' Appendix (Res. App. A).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its decision and judgment herein on September 30, 1996. Timely petitions for rehearing and rehearing en banc were filed by Cross Respondent/Petitioner Staples and Respondent, Secretary of Housing and Urban Development which were denied by the Sixth Circuit on January 24, 1997.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioner's petition for writ of certiorari docketed April 28, 1997.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Fair Housing Act as amended, 1988, 42 U.S.C. §§3601-19 and 24 CFR 103.1 through and including 24 CFR 104.590. Selected portions of 42 U.S.C. are reproduced and included in Case No. 96-1712 (Respondents' App. E). Selected portions of 24 CFR are reproduced and included in Case No. 96-1712 (Respondents' App. F).

STATEMENT OF THE CASE

Respondents Michael P. Kelly and John T. Kelly respectfully oppose Staples' petition for a writ of certiorari. The petition is an exercise in creative writing that is short on facts and long on emotion. Respondents are compelled to set forth the facts as Petitioner's is inaccurate.

FACTS:

The Petitioner allegedly made a phone call on March 5, 1990, to inquire about the availability of an apartment. Petitioner never viewed the apartment or went to the apartment and does not know with whom she spoke. Petitioner's sole observation of the apartment was from a bus window. Petitioner perceived that she was denied the apartment after a short phone conversation. Petitioner sought the assistance of Housing Opportunities Made Equal, Inc. (HOME), a local fair housing agency. The individual from HOME limited her investigation to asking Petitioner with whom she spoke. Based on the foregoing, HOME filed a complaint on behalf of Staples with HUD on May 19, 1990, that was filled with incorrect information.

HUD received the Staples complaint and sent it to an investigator, Charles Jung, who is assigned to HUD's Cincinnati office. This administrative assignment compounded HOME's error ridden complaint and commenced a series of violations by HUD of its own regulations, the Fair Housing Act, the criminal code and due process rights of Michael P. Kelly and John T. Kelly.[1] The full extent of HUD's noncompliance with the Fair Housing Act and the

---

[1] James Wm. Kelly who was initially named as a discriminator in the second amended complaint filed November 1990 was never served with a complaint or contacted by Jung and was dismissed by the Administrative Law Judge as a party.

incompetence of HUD in dealing with Michael P. Kelly and John T. Kelly undermined every procedural safeguard in the Fair Housing Act, Congressional intent in the administration of the Fair Housing Act and deprived HUD of jurisdiction of the complaint.

HUD AND INVESTIGATOR JUNG:

A. **Service of Complaints**

HUD served Respondent Michael P. Kelly with the initial complaint at Michael P. Kelly Realty but never served the amended complaint or second amended complaint on him. John T. Kelly was never served with the initial complaint, amended complaint or the second amended complaint in compliance with the Fair Housing Act or HUD regulations. The second amended complaint was never served on James Wm. Kelly, who was alleged to be a discriminator, but he was subsequently dismissed as a party. In fact, the second amended complaint naming James Wm. Kelly as a discriminator was filed one month after Jung completed his investigation in this matter.

Jung never contacted Respondent Michael P. Kelly by phone or in person during the course of his investigation. Respondent Michael P. Kelly contacted Jung once concerning the complaint. While allegedly investigating the Staples' complaint, Jung arranged conciliation where Jung served as investigator and conciliator in violation of HUD regulations. Respondent Michael P. Kelly, Dionne Staples and representatives from HOME attended the conciliation. Respondent John T. Kelly attended the conciliation session with his brother Michael, but John T. Kelly was not aware that he was named as a discriminator at the time of the meeting and never received notice that he was named in a

complaint until August 1990.[2]

At the conclusion of the July 1990 conciliation meeting, Jung took the information provided in conciliation, that Jung never verified, and filed an amended complaint against Michael P. Kelly and John T. Kelly. Jung's use of information obtained in conciliation to file an amended complaint is in violation of HUD regulations and the Fair Housing Act. The notice of the filing of the amended complaint served by Jung on John T. Kelly did not meet the minimal requirements required by the Fair Housing Act concerning conciliation and the rights of the purported discriminator. Jung never served Michael P. Kelly with the first amended complaint.

When John T. Kelly received the amended complaint approximately two weeks after conciliation, he decided Jung was either incompetent or dishonest or both. John T. Kelly's impression of Jung proved accurate. John T. Kelly sent a response to HUD's Chicago Regional Office bypassing Jung. Jung failed to investigate any of the Staples' complaints in compliance with the Fair Housing Act, and under the guise of conciliation, used the information obtained in conciliation against the Kellys. It was obvious Jung could not be trusted, and the level of his incompetence is demonstrated in his trial testimony and observations of the Administrative Law Judge.

Jung never attempted to determine if service was made on Michael P. Kelly or John T. Kelly in compliance with the Fair Housing Act or HUD regulations even though he was the assigned investigator, because he alleged at trial it was not his job. Jung never spoke to any of HOME's testers during the

---

[2] John T. Kelly was a co-owner of the apartment building in question and attended the conciliation at Michael P. Kelly's request. Petitioner makes reference to conciliation attempts by Jung (Petitioner's Appendix H 137-140), but John T. Kelly was not even served or notified of the complaint against him or his right to conciliation until August 1990.

course of his investigation. Jung spent a total of 20-25 minutes with Staples concerning her original complaint and two amended complaints which he testified at trial to being his normal investigative technique. Jung uses the local building or health code to determine a violation of the Fair Housing Act concerning familial status discrimination, but he does not have a complete copy of the local Cincinnati Basic Building Code relevant to the subject property. Jung has no idea of the responsibilities of property owners and believes the owner could be issued a condemnation order if the Building Code is violated, however he doesn't know what a condemnation order is.

Staples doesn't know with whom she spoke on March 5, 1990, and Jung never bothered to find out. Both HOME and Jung testified that it is important to determine who the complainant spoke to on March 5, 1990, but neither HOME nor Jung attempted to determine the identify of the individual. None of the witnesses could identify Michael P. Kelly or John T. Kelly as the individual who refused to rent, deal or negotiate for the rental of 6300 Montgomery Road.

The Kellys responded to Jung's request for information in September 1990, but they could not deal with him, because, due to his actions after conciliation, they believed him to be incompetent and deceitful. Jung completed his investigation on October 2, 1990. Jung didn't tell the Kellys the investigation was completed and, in fact, did not contact the Kellys after September 1990. The Kellys never received any correspondence concerning Staples' complaint after September 1990 from HUD or anyone else until March 1992. Staples wasn't contacted by HUD from October 2, 1990 until March 1992.

THE REASONABLE CAUSE DETERMINATION:[3]

HUD served the reasonable cause determination on Michael P. Kelley and James Wm. Kelly at 2147 St. James Place, Cincinnati, Ohio.[4] After two years, HUD still couldn't serve documents in compliance with the Fair Housing Act or even spell the parties' names correctly. Subsequent attempts at service eventually reached Michael P. Kelly and John T. Kelly. Answers were filed on behalf of Michael P. Kelly (Respondents' App. G) and John T. Kelly (Respondents' App. G). Respondents Michael P. Kelly and John T. Kelly conducted discovery and filed Motions to Dismiss (Respondents' App. H). The Motions to dismiss were overruled. (Respondents' App. H)

Respondents attempted to subpoena Jung's superiors to testify concerning Jung's actions and HUD's compliance with its regulations and the Fair Housing Act. The agency's Administrative Law Judge quashed the request for subpoenas and spared Jung's superiors from cross-examination.

THE TRIAL:

The trial was remarkable as not one witness could identify Michael P. Kelly or John T. Kelly as the individual who spoke to Staples. Jung was exposed as an incompetent who repeatedly violated the Fair Housing Act and HUD regulations at the expense of Respondents' rights. HUD trial counsel was exposed for answering and signing

---

[3] Neither the Kellys nor Staples were represented by counsel prior to the issuance of the reasonable cause determination. Morgan served as general counsel for HOME during all or a portion of these proceedings.

[4] Ironically, although Michael, John and James Kelly are brothers, HUD added an extra "e" to Michael and John's last name while spelling James' last name with one "e."

interrogatories under oath that Jung purportedly answered but in fact never saw until trial. Against this backdrop of HUD duplicity and incompetence, the Administrative Law Judge held that the liability finding in this case was not based on Jung's credibility. Even the Administrative Law Judge found Jung, his investigation and HUD's handling of the complaints completely unreliable and incredulous.

The Kellys presented testimony that they rented to families with two children before the Fair Housing Act was enacted and after it was amended in 1988. The Kellys testified that they attempted to comply with the local occupancy code. The code enforcement official and the Director of Buildings and Inspections of Cincinnati both testified that occupancy laws are enforced. Nonetheless, the Administrative Law Judge ruled in favor of Staples and ordered a damage award and a plethora of enforcement mechanisms for which there is no justification in the record.[5]

THE FIRST APPEAL:

The Kellys appealed and Staples cross appealed, and the case proceeded to the Sixth Circuit. The Kellys believed the decision of the Administrative Law Judge was erroneous and Staples wanted more money. As Judge Lively stated at oral argument, the Sixth Circuit had to bail HUD out again. The Kellys' due process rights were dashed at the expense of protecting HUD. The Sixth Circuit vacated the damage award with the instruction that damages shall not be assessed during the period the case was completely neglected by HUD. The case was remanded with instructions not to award damages for the period of time HUD completely neglected the case and that the parties should attempt conciliation with a

---

[5] Petitioner's brief makes a reference to race discrimination, however, Ms. Staples testified that both Jung and HOME informed her there was no basis for the race complaint.

competent, unbiased conciliator.[6]

INITIAL DECISION ON REMAND:

The remand of the case to the same Administrative Law Judge was an exercise in futility based upon the issuance of the Administrative Law Judge's order (Respondents' App. D). It was soon apparent that any submission to the Administrative Law Judge was strictly a formality, because the Administrative Law Judge's order in response to the Sixth Circuit's decision forecast exactly what the Administrative Law Judge's decision would be on remand. After finding that Jung lacked credibility, that HUD counsel had filed false interrogatories under oath and that HUD was indifferent to the Fair Housing Act, the Administrative Law Judge found that there was no period of complete neglect. Essentially the Administrative Law Judge found that even though the case was built on quicksand, HUD dispatched its duties, and the award was reduced by One Dollar, required payment of interest and extended reporting requirements. The decision amounted little more than vendetta justice.

THE ATTORNEY FEES:

Upon receipt of the initial decision on remand, Staples' counsel filed a petition for fees. The Kellys' counsel also filed a petition for fees. The Administrative Law Judge awarded fees to Staples' counsel in the sum of Thirty Thousand Six Hundred Fifty-two and 46/100 Dollars ($30,652.46)(Respondent's App. A). The Kellys' fee petition

---

[6] Conciliation after the decision on the first appeal to the Sixth Circuit was an exercise in futility, as the demands were exorbitant, and the HUD conciliators were ineffectual five years after the date conciliation should have occurred.

was denied.[7] Neither Staples' counsel nor Kellys' counsel was involved in this case until after the Probable Cause Determination was issued in March 1992 or twenty-one months after the case was required to be concluded. The appearance of counsel was after the twelve-month period in the Court's decision in Kelly II.

THE SECOND APPEAL:

On appeal, the Sixth Circuit reduced Staples' damage award rather than finding that HUD completely neglected the case from Day One and lacked jurisdiction. Rather than address the due process violations and HUD's complete neglect and enforce the law as written, the Court gave Staples a compensatory damage award, an award of attorney fees almost seven times what Staples received and awarded the Kellys $20,000.00 in fees and expenses for the pursuit of their appeal rights before an agency that would not comply with its own regulations and rules; that persistently and repeatedly attempted to circumvent justice; that adamantly displayed a cavalier attitude toward the due process rights of the Kellys; that, with feckless abandon, attempted to exacerbate damages and alienate the parties; and that, even in the world of bureaucratic red tape, elevated the definition of "complete neglect" to a new high. HUD was an agency run amok.[8]

---

[7] Although Judge Ryan stated in his dissent that the Kellys did not file a fee petition, it was included in the joint appendix and in the record filed with the Sixth Circuit.

[8] Kellys offered payment to Staples and notified Morgan that arrangements were being made to pay his fees. Morgan never responded to the Kellys' offer of payment. Delay in payment does not lie with the Kellys but with the nonresponse by Petitioner's counsel to assert an emotional appeal that everyone is paid except Staples and Morgan.

REASONS FOR GRANTING THE WRIT:

I. Whether a government agency retains jurisdiction when it has completely neglected a case by its failure to timely comply with the Fair Housing Act as amended in 1988, 42 U.S.C. 3601 et. seq., concerning notice of complaint, investigation, conciliation and issuance of probable cause as required by law and violates the due process rights guaranteed to citizens by failure to provide notice in compliance with law and thereby renders it orders invalid.

This case presents the Court with a governmental agency that is absolutely indifferent to federal law it is required to enforce, duplicitous with the Courts and contemptuous of the rights of citizens. Upon initial review by the Sixth Circuit in Kelly v. Secretary, HUD, 3 F.3d 951 (6th Cir. 1993) (Kelly I), the Court ruled that in no case should damages be assessed for the period during which HUD completely neglected this case. This proceeding involves a Housing of Urban Development Administrative Law Judge's indifference to a Court mandate, knowing disregard by HUD of the Fair Housing Act, 42 U.S.C. 3601 et. seq., and the intentional submission of false affidavits by HUD in violation of federal law to various Courts. The issue of the determination of complete neglect dates to the assignment of this case to HUD and not by an artificially created twelve-

---

Further, Petitioner alleges this case languished in the Sixth Circuit when in fact the Court had three appeals before it: (1) Kellys' appeal, (2) Petitioner's appeal of One Dollar reduction in damages, and (3) The issue of attorney fees. All appeals were consolidated in one decision. Petitoner's counsel also failed to mention his request to extend time to file Petitioner's brief.

month period when this case was to be completed.

In Secretary, HUD, on behalf of Herron v. Blackwell, 908 F.2d 864, 869 (11th Cir. 1990), the Court discussed at length the amendments to the Fair Housing Act passed in 1988. The amendments created elaborate enforcement mechanisms that were totally neglected by HUD in the instant case. The issue in this case is: When did HUD deal with this case in conformity with law and its regulation and thereby not totally neglect the case? The answer is NEVER!

The authority and responsibility for administering the Fair Housing Act is assigned to the Secretary of Housing and Urban Development (Secretary). 42 U.S.C. 3608(a). The Secretary may delegate any of his functions, duties and powers to employees of the Department of Housing and Urban Development. 42 U.S.C. 3608(c). The individuals selected shall administer their programs and activities in a manner affirmatively to further the purposes of the Act. 42 U.S.C. 3608(d) (emphasis supplied). In the instant case, the individuals selected to further the purposes of the Act were Charles Jung, the HUD investigator, Konrad Rayford, trial attorney for HUD in this proceeding, the Administrative Law Judge and the United States Department of Justice.

The Secretary is required by law and its regulations to provide to the named respondent within ten days after the filing of a complaint a notice identifying the alleged discriminatory housing practice and advise such respondent of his procedural rights and obligations, together with a copy of the original complaint. 42 U.S.C. 3610(a)(B)(ii) and 24 CFR 103.50. In the instant case, the Secretary and Charles Jung failed to serve John T. Kelly with a copy of the initial complaint, first amended complaint, second amended complaint or with information concerning his procedural rights and obligations under the Act as required. The terminology used in the Act is unambiguous: ". . . the Secretary shall . . .". This is a command and not permissive.

42 U.S.C. 3610(a)(B)(ii). Within ten days of the filing of the complaint HUD was not following the law and thereby totally neglecting the case.

The Secretary is mandated to make an investigation of the alleged discriminatory housing practice and complete the investigation within one hundred days of the filing of the complaint (or last filed amended complaint naming an additional respondent) unless it is impracticable to do so. 42 U.S.C. 3610(a)(B)(iv) and 24 CFR 103.225. Further, if the Secretary is unable to complete the investigation within one hundred days after the filing of the complaint (or last filed amended complaint naming an additional respondent), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so. 42 U.S.C. 3610(a)(C). In the instant case, no notices were sent that the investigation was complete or notifying the Kellys of any reason for the delay.[9] This is another instance of HUD's failure to comply with the law and total neglect of the case.

It is incumbent upon the Secretary within 100 days after the filing of the complaint to determine, based on the facts, whether reasonable cause exists to believe a

---

[9] Charles Jung testified at trial that he completed his investigation on October 2, 1990. Jung's final investigation report reflects that Dionne Staples signed a second amended complaint on November 5, 1990, and James Kelly and all other named respondents were notified of the second amended complaint on November 5, 1990. Charles Jung sent the second amended complaint to James Kelly, 2147 St. James Avenue, Cincinnati, Ohio 45206, where James Kelly does not reside and has never resided. Further, Charles Jung testified that neither Michael P. Kelly nor John T. Kelly were served with the second amended complaint. Jung completed his investigation on October 2, 1990, according to his trial testimony, but his investigation report contains information after October 2, 1990. Jung's investigation was completed prior to one of the parties even being served, but Jung through some psychic insight knew he would serve the complaint thirty-four days later.

discriminatory housing practice has occurred, unless it is impractical to do so. In the event the Secretary determines it is impractical to timely issue a determination of reasonable cause, written notification of the reasons for not doing so must be sent to the complainant and respondent. 42 U.S.C. 3610(g) and 24 CFR 103.400. The undisputed evidence in this case reflects that the determination of reasonable cause was not accomplished until March 2, 1992. The time period for filing a probable cause determination is 100 days from the filing of the complaint or last amended complaint. The complaint filed November 5, 1990 was the last filed complaint, although HUD did not notify any parties. No extensions were sought by HUD claiming impracticality to complete the investigation at any time. The affidavit of Robert R. Bouchard in Petitioner's, Appendix Case No. 96-1712, at pp. H 145-146 states letters were sent to Kelly Realty, who is not a party, M. Kelly, who was served at 2147 St. James Place, Cincinnati, Ohio, and is not the same M. Kelly as Cross-Respondent, and D. Kelly. Bouchard's affidavit submitted to the Administrative Law Judge on remand of the case by the Sixth Circuit in Kelly I is fraudulent or trial counsel deliberately made a misrepresentation to the Administrative Law Judge at trial, and the appellate attorneys for HUD made a misrepresentation to the Sixth Circuit when it acknowledged HUD didn't comply with the law concerning issuance of notices of impracticability.

Evidently depending on the forum HUD is proceeding, it produces the evidence it deems necessary to substantiate its case regardless of its authenticity or veracity. Conveniently after two separate representations in Court proceedings, HUD is able to generate a self-serving affidavit to show compliance with the law. Bouchard's affidavit does not have the notice allegedly sent attached or to whom it was addressed. Bouchard was good enough to send a notice to D. Kelly, and

there is no D. Kelly involved in the case.

The actions of HUD and the investigator go beyond any semblance of compliance with the Fair Housing Act, and the actions standing alone demonstrate the lack of jurisdiction, the substantial prejudice to the Kellys by the denial of service, denial of objectively reasonable conciliation, denial of an objectively reasonable investigation, failure to serve a probable cause determination within 100 days, incompetence, and conduct that, if not criminal, is a manipulation of the justice system. Congressional mandates concerning jurisdiction and the Kellys' due process rights regarding notice and statutory entitlements were disregarded by HUD to the extent of filing false affidavits or making false representations to the Court.

The transcript in this proceeding containing Mr. Jung's testimony reflects that his investigations are "conducted in accordance with the law and Fair Housing Act," as he understands it. Jung, while serving as investigator on this complaint, conducts a conciliation in violation of HUD regulations serving as investigator and conciliator. 24 CFR 103.300(c). Unable to resolve the case, Jung uses information obtained during the conciliation to file an amended complaint in direct contravention of the law. 24 CFR 103.330(a). The trial record reflects that it is Jung's responsibility as the investigator "to make sure the initial complaint is served" although he never did. The list of transgressions of the law by the investigator and HUD is so lengthy and the incompetency so glaring it cannot be limited to 30 pages. I feel compelled to request the Court to read the cross examination of Mr. Jung to determine if his cavalier attitude toward Congressional acts, Congressional intent and judicial rulings comports with jurisdictional requirements or due process. HUD and Jung's conduct demonstrates the process inflicted on the Kellys by HUD was unfair and inequitable and failed to comply with the law. Jung's cross

examination clearly demonstrates that he completely neglected this case from day one with the assistance of the error ridden complaint prepared by H.O.M.E.

While the Administrative Law Judge clearly recognized that "egregious" errors by the government produces erosion of public confidence, the Administrative Law Judge ignored the total neglect of his agency. Jung's incompetence and total neglect coupled with his superior's lack of oversight collectively and substantially prejudiced Michael P. Kelly and John T. Kelly by denying them any procedural safeguards of an objectively reasonable conciliation or an objectively reasonable investigation, as contemplated by Congress. HUD was hard pressed to deny the various failures at trial and before the Sixth Circuit at the first appeal in Kelly I to comply with statutory requirements and its own regulations. Even the Administrative Law Judge stated at the conclusion of the trial of the case that the accumulation of errors on the government's part has the cumulative effect to undermine the effectiveness of government and to undermine the public's trust in government but nailed the Kellys. The Administrative Law Judge's own observations bolster and substantiate that HUD totally neglected the case. On remand before the Administrative Law Judge, HUD officials submitted affidavits that are at best self-serving and untrue. The Administrative Law Judge did not take his agency to task on the false affidavits but rather ignored the duplicity.

The foregoing are instances of the outright violation of the Fair Housing Act, and the Code of Federal Regulations by the Secretary or his representatives in the enforcement of the Act at the earliest stages and throughout these proceedings. The combination of the deficiencies and violations far exceed any witnessed by this Court or in any reported decision. In the instant case, HUD lacked jurisdiction because it didn't serve the complaint in accord

with the Act or Regulations and distorted the investigatory process by completing an investigation prior to service of the complaint on a named party. Further, HUD's failure to issue a probable cause determination and complete its investigation within 100 days would lead any reasonable person to believe the complaint was dismissed because the law requires the completion of the investigation and issuance of a probable cause determination within 100 days, not two years. HUD's failure to comply with Congressional mandates in this case are troubling for any citizen and demonstrate a period of complete neglect. Congress provided a timetable for investigations and determination of probable cause of 100 days and even permitted extensions if the completion of the task was not practical provided there was notice.

HUD could not have entertained Ms. Staples' complaint if it was filed after March 5, 1991 due to the one-year statute of limitations. 42 U.S.C. 3610(a)(1)(A)(i). Although timely filed, HUD did not comply with statutory requirements, totally neglected the complaint and thus the claim should be barred. Who better than HUD understands the various permutations and requirements of the Act since it is charged with its enforcement? The Act should not be used as a sword by HUD and as a shield to hide behind when it fails to comply. This Court must require HUD to follow the law.

The tired and hackneyed excuse advanced by HUD that it is not possible to comply because its caseload has increased was addressed by Congress by permitting HUD to obtain extensions for investigations and determinations of probable cause, provided notification is sent to the parties involved. The House Report on the Fair Housing Amendments Act of 1988 states:

> . . . These notice requirements underscore the roles to be played by HUD in the administrative process. Both the aggrieved

> person and the respondent may rely on HUD for information and advice . . .

House Report at p. 33. Further, Senator Specter specifically stated that the amendments of 1988 provide for an expeditious enforcement proceeding. Congressional Record, Vol. 134, Part 14, Page 19716. Additionally, Congressman Fish specifically stated that both Complainants and Respondents are guaranteed due process rights. Congressional Record, Vol. 134, Part 15, Page 20918.

Congress clearly intended that HUD would play a role in the administrative process and not a dilatory role that obstructed the intent of Congress. The respect for the due process rights of the aggrieved person and the respondent mandated by Congress in the HUD administrative process is clear. HUD is not empowered to obstruct due process rights by ignoring Congressional mandate. Practical concerns of limited resources cannot justify HUD's actions.

The Kellys made two separate attempts to dismiss the action. The first attempt was a pretrial motion before the Administrative Law Judge that was denied. (Respondents' App. H). The second motion to dismiss was at the conclusion of the government case. Jurisdictionally, the first motion should have been granted and for evidentiary reasons, the motion at the conclusion of the government's case should have been granted. HUD is not to be accorded any deference or its interpretation of regulations given controlling weight when it is plainly erroneous or inconsistent with the law or regulation. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

All the Kellys request is that this Court fulfill its duty to enforce an agency regulation mandated by federal law. Bridges v. Wixon, 326 U.S. 135, 152-153. In this case, Congress required HUD to adopt certain procedures. To assume that an agency can formalize procedures and then

ignore same is ludicrous. Unfortunately, that is precisely what HUD did in this case. Agency action taken without observance of procedure required by law and in violation of agency regulations requires invalidation. United States v. Caceres, 440 U.S. 471, 753 and 754 (1979).

The Kellys have argued since day one the courts must examine the legislative history and determine that the words of the Fair Housing Act are not ambiguous. Mohasco Corp. v. Silver, 447 U.S. 807, 818 (1980). The Sixth Circuit that altered the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction. Id. at 826. It is quite clear from the legislative history of the Fair Housing Act that Congress set in place a procedure for the processing of complaints, and HUD's indifference to time deadlines is done at the agency's peril. Since HUD had no jurisdiction, all decisions concerning this matter should be reversed and the case dismissed. HUD must pay for its duplicity that vanquished the rights of the Kellys and the rights of Staples.

II. Whether a citizen who compels a government agency to comply with the law, comply with agency regulations, secures due process rights envisioned by Congress and exposes fraudulent conduct of a government agency is a prevailing party.

The Kellys are prevailing parties pursuant to 42 U.S.C. Section 3612(p) and are entitled to a fully compensatory award of fees. The Administrative Law Judge's decision concerning fees is best summed up in a footnote inserted in his decision that refers to the Kellys' complaints as niggling. (Res. App. A). Quite simply, if HUD was as niggling about the law and its regulations, the Kellys would not be required to expend such an exorbitant sum to protect their rights and others similarly situated. The

Administrative Law Judge had a *winken, blinken* and *nod* attitude towards HUD's incompetence and lawlessness and to the Kellys' due process rights throughout this process.

The only party that did not prevail in this unique case was HUD. The Kellys did not have an attorney until two years after the purported discriminatory act. Consistent with the Sixth Circuit's decision, the Kellys were entitled to the legal fees and costs to defend this action and require HUD to comply with the law. Further, the U.S. should pay both Staples' and Kellys' fees as Staples did not have legal representation until April 1992. The law requires that the agency be liable. 42 U.S.C. Section 3612(p). As the Kellys pointed out in their motions to dismiss, due process required the intervention of the Administrative Law Judge to halt the abuse of the Kellys' due process rights. When the Administrative Law Judge was informed that "HUD is absolutely out of control, and the failure of this tribunal to intervene will cause this Respondent's damages to grow", the Administrative Law Judge ignored the Kellys and permitted their damages to escalate at a geometric rate or capitulate to his agency.

CONCLUSION

HUD's conduct is clearly contrary to law, and the period of twelve months is not even mentioned in the statute. A lawless, deceptive and incompetent government agency should not be protected by the Courts but rather condemned. This Court should grant the writ of certiorari.

/S/_____
JOHN K. LIMOLI
Counsel of Record

1402 Sunset Drive
Fairborn, Ohio 45324
(937) 878-6051

Attorney for Cross-Petitioners'
John T. Kelly, Michael P. Kelly